OAH Docket No. 7-1700-19038-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
Velma Korbel, Commissioner,
Department of Human Rights,
Complainant,

v.

Chisholm Medical Clinic,
Respondent.

ORDER DENYING SUMMARY DISPOSITION, DENYING MOTION TO STRIKE, AND COMPELLING DISCOVERY

This matter came before Administrative Law Judge Richard C. Luis on cross motions by Chisholm Medical Clinic ("Respondent") and the Department of Human Rights ("Department"). Respondent has moved for summary disposition and moved to strike an affidavit from the pleadings. The Respondent's motions were received on February 7, 2008 and Februay 29, 2008. The Department moved to compel discovery of employment records held by Respondent. The Department's motion was received on February 11, 2008. Both parties filed replies. Arguments on the motions were made on March 11, 2008, at the Office of Administrative Hearings. The motion record closed with the receipt of a posthearing filing on March 12, 2008.

Margaret Jacot, Assistant Attorney General, appeared on behalf of the Department. Henry M. Helgen, III, of McGrann Shea Anderson Carnival Straughn & Lamb, Attorneys at Law, appeared on behalf of the Respondent.

Based upon the record in this matter, and for reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The Respondent's Motion for Summary Disposition is DENIED.

2. The Respondent's Motion to Strike is DENIED, subject to the preparation of a privilege log and submission of those documents for which privilege is claimed to the ALJ for *in camera* review.

3. The Complainant's Motion to Compel Discovery is GRANTED.

4. Dispostive motions will be filed by the parties not later than March 26, 2008. The parties will disclose their witness lists, a summary of testimony,

and copies of exhibits not later than April 21, 2008. The hearing in this matter is rescheduled to April 28 through 30, 2008.

Dated: March 14, 2008

_/s/ Richard C. Luis_____
RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[1] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[2] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[3]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[4] When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[5] All doubts and factual inferences must be resolved against the moving party.[6] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[7] Summary judgment should only be granted in those instances where there is no dispute of fact and where there exists only one conclusion.[8]

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[1] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.,* 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.
[2] *See*, Minn. Rules 1400.6600 (2004).
[3] *Illinois Farmers Ins. Co. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[4] *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[5] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[6] *See, e.g., Thompson v. Campbell,* 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).
[7] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-251 (1986).
[8] *Id.*

The Charging Party was employed by Respondent as a lab technician. In 2005, Charging Party's pregnancy resulted in dizziness and a potential for fainting. Charging Party was examined by a physician who issued a physician's order precluding phlebotomy work [blood draws] for a period of two weeks. Respondent discharged the Charging Party the day after the physician's order was presented. The Department brought a claim of sex discrimination arising out of Charging Party's discharge from employment with Respondent. Respondent argues that conducting blood draws is a bona fide occupational qualification (BFOQ) that justifies the Charging Party's discharge. Respondent argues that the action was based on discrimination, the reason for discharge was not a BFOQ, and that the matter should proceed to hearing.

Respondent moves for summary disposition, asserting that the discharge of the Charging Party is not prohibited discrimination under the Human Rights Act.

Legal Standard

Charges of discrimination are governed by the Minnesota Human Rights Act (Minn. Stat. Chap. 363A). Minn. Stat. § 363A.08, subd. 2, states in pertinent part:

> Subd. 2. Employer. Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age to:
>
> * * *
>
> (2) discharge an employee; ….

Discrimination based on sex includes "pregnancy, childbirth, and disabilities related to pregnancy or childbirth."[9] There is no dispute that the Charging Party's physical condition was related to her pregnancy.

Factual Analysis

Respondent maintains that the termination of the Charging Party was not discrimination because it was based on a BFOQ, and thereby exempt under Minn. Stat. § 363A.08, subd. 2. Respondent notes that blood draws are part of a lab technician's duties. Respondent, relying on the Charging Party's deposition

[9] Minn. Stat. § 363A.03, subd. 42.

testimony, maintains that "blood-drawing phlebotomy duties … comprised at least 80% of her job."[10]

The Department responded that the Charging Party's deposition testimony was inaccurate, that the decision-maker was unaware of what job duties were affected by the disability, that no inquiry was performed as to stated reasons for the discharge, and that the Respondent improperly considered the period outside of that stated in the physician's note in deciding to terminate the Charging Party.

Viewed in the light most favorable to the non-moving party, as the ALJ must on a motion for summary disposition, the following facts are presented by this matter:

On May 9, 2005, Charging Party saw Dr. Kristina McCaughtry, her obstetrician ("OB-GYN"), regarding dizzy spells, hot flashes and fainting. Dr. McCaughtry diagnosed the cause of the dizziness as fetal positioning, exacerbated by leaning over when Charging Party was drawing blood. The doctor told Charging Party that she should not bend over at all for two weeks. [11] Dr. McCaughtry indicated that Charging Party could continue working on light duty. Dr. McCaughtry then wrote Charging Party a note which stated, "Ms. Fosso needs to have 2 weeks of no phlebotomy duties due to syncope concerns."[12] Phlebotomy means the drawing of blood.[13] The Charging Party did not think that she was being removed from any work other than the process of drawing blood.[14]

Later on May 9, 2005, Charging Party presented the note to Ms. Redmond, her supervisor. Ms. Redmond arranged to perform the blood draws. In exchange, the Charging Party would perform some of Ms. Redmond's outreach scheduling work. Outreach scheduling was performed sitting down with a patient and performing the scheduling or other preparation required before that patient's procedure was conducted at a hospital. Ms. Redmond's outreach scheduling duties took an average of about two hours per day. Blood drawing was mainly performed standing up.[15] The amount of time Ms. Redmond spent on outreach was roughly equal to the amount of time that Charging Party spent drawing blood.[16]

As a medical laboratory technician, Charging Party's job involved drawing blood, collecting urine specimens, and processing lab samples including blood, urine, hemocult, wet mount, throat cultures, urine pregnancy tests, mono spot tests, and blood sugar tests. Charging Party was also expected to complete

[10] Respondent's Memorandum of Law in Support of Motion for Summary Disposition, at 4.
[11] Affidavit of Kalee Fosso ("Fosso Aff.") ¶ 3.
[12] Jacot Aff. Ex. C, Heise Dep. Ex. 12.
[13] *Id*. Ex. A, Fosso Dep. 35:1, Ex. B, Redmond Dep. 14:10.
[14] Fosso Aff. ¶ 3.
[15] Jacot Aff. Ex. B, Redmond Dep. 24:13-16.
[16] Affidavit of Marianne Redmond ("Redmond Aff.") ¶ 3.

blood, urine, and tissue specimen preparations for reference lab testing and run controls on kits. She spent roughly 5 to 6 hours a day processing lab samples. In addition, Charging Party performed quality assurance/control testing on clinic machines, performed proficiency testing, reviewed drug supplies and threw out expired drugs, notified nursing homes regarding lab results, and filed lab and patient charts. Occasionally, Charging Party would fill in for the receptionist by taking phone calls and scheduling patients or she would complete medical transcriptions for pre-ops. Sometimes Charging Party had special projects including researching new tests and machinery for the clinic, meeting with sales representatives for the machinery, and updating old x-ray files.[17] The only job duty that Charging Party could not perform as a result of her job restriction was drawing blood while standing up.[18]

After arranging to address the work restriction with Ms. Redmond, the Charging Party gave Kim Heise, the clinic's office manager, a copy of the doctor's note.[19] Charging Party told Ms. Heise that the job duty adjustments were taken care of to meet the restriction.[20] Ms. Heise then brought the note to Dr. Wilson.[21]

On May 10, 2005, Dr. Wilson and Ms. Heise called Ms. Redmond into a meeting and informed her that the Charging Party was going to be terminated.[22] Ms. Redmond had not been consulted in arriving at the decision.[23] Ms. Redmond told Dr. Wilson that she and Charging Party had made plans to share duties, that Ms. Redmond would draw blood and Charging Party would do the outreach scheduling duties.[24] Dr. Wilson replied that he had not known about the plans and he would not change his mind.[25] Ms. Heise called Ms. Fosso that evening and told her she was being terminated because the clinic could not accommodate her pregnancy-related restrictions.[26] Ms. Fosso did not have any additional problems with dizziness or fainting after leaving the Chisholm Medical Clinic.[27]

Ms. Redmond and the Charging Party had divided their duties between them on previous occasions. Neither Respondent nor other employees objected

[17] Fosso Aff. ¶ 2.
[18] Jacot Aff. Ex. A, Fosso Dep. 31:4-10, 36:10-11.
[19] Jacot Aff. Ex. B, Redmond Dep. 25:13-18.
[20] *Id*. Ex. A, Fosso Dep. 38:9-15.
[21] *Id*. Ex. C, Heise Dep. 40:15-41:15, Ex. D, Deposition of Dr. William Wilson ("Wilson Dep.") 80:6-14, January 10, 2008.
[22] *Id*. Ex. B, Redmond Dep. 35:3-25.
[23] *Id*. at 41:9-15.
[24] *Id*. at 39:18-22.
[25] *Id*.
[26] *Id*. Ex. A, Fosso Dep. 56:22-57:16.
[27] *Id*. Ex. F.

to these divisions.[28] The Charging Party's position went unfilled by a full-time replacement for almost two months.[29]

The Department investigation has uncovered evidence that other employees of Respondent have experienced negative job actions surrounding pregnancy-related issues. In 2002, nurse practitioner Tami Matuszak became pregnant.[30] Respondent agreed that she would receive six weeks of paid maternity leave and when her leave ended she would return to work on a part-time basis, working three days a week and receiving pay for those three days of work.[31] In May 2003, toward the end of her leave, Respondent demanded that she return to work full time, which she did.[32] In October of 2003, Ms. Matuszak resigned due to the change from a part-time schedule to full-time.[33] Respondent then demanded repayment of the salary that Ms. Matuszak had received during her paid maternity leave. Respondent withheld Ms. Matuszak's last paycheck as partial payment and she had to sue in conciliation court to get her paycheck. The court found in Ms. Matuszak's favor and she was awarded back wages. The judge also ordered Respondent to pay Ms. Matuszak' an additional amount as a penalty.[34] Dr. Wilson subsequently filed a complaint concerning Ms. Matuszak to the Minnesota Board of Nursing.[35]

In December of 2003, Jennifer Showalter, the clinic's office manager, was experiencing a high risk pregnancy. At that time, Respondent was moving from one clinic location to another. Dr. Wilson asked staff if Ms. Showalter was helping with the moving work and stated he wanted to be certain that Ms. Showalter was helping and was not using her pregnancy as an excuse to "shirk" her job duties.[36] When Ms. Showalter discussed her maternity leave with Dr. Wilson, he indicated that she could take an unpaid six-week maternity leave and that the head R.N. would cover for her. Just prior to Ms. Showalter's delivery, Respondent fired the head R.N.[37] Two days after Ms. Showalter gave birth, Dr. Wilson informed her that he needed her to return to work.[38] Respondent would pay her a higher hourly wage while she was working during her maternity leave. Id. Ms. Showalter agreed and she worked during the six weeks following the birth of her son. She brought her son to work with her and found it difficult to return to work with a newborn, breastfeed, and fill in when the clinic was short-staffed. Dr. Wilson sent Ms. Showalter an e-mail after she had completed the leave period and indicated that he did not think that the work she had performed during the leave period merited paying her the higher hourly wage that they had agreed

[28] Redmond Aff. ¶ 2.
[29] Jacot Aff. Ex, C, Heise Dep. 80:8-81:3.
[30] Jacot Aff. Ex. D, Wilson Dep. Ex. 4.
[31] Klausing Aff. ¶ 4.
[32] Jacot Aff. Ex. D, Wilson Dep. Ex. 4.
[33] Id. at Ex. 5.
[34] Klausing Aff. ¶ 5-6.
[35] Jacot Aff. Ex. D, Wilson Dep. 5 8:2-4.
[36] Klausing Aff. ¶ 12.
[37] *Id*. ¶ 13.
[38] *Id*. ¶ 14.

upon.[39] In May of 2004, Ms. Showalter left the employ of the Respondent. Ms. Showalter expressly complained of the way Dr. Wilson handled her maternity leave in her letter of resignation.[40]

In 2006, after Ms. Fosso was terminated, clinic manager and R.N. Tammi Gustafson became pregnant. She experienced complications and her doctor restricted her to working only four hours per day. Ms. Gustafson was paid a salary rather than an hourly wage and Dr. Wilson always told staff that as salaried employees, sometimes they would work extra hours and sometimes they would work fewer hours and they would always get paid the same salary. When Ms. Gustafson had to reduce her hours, Dr. Wilson came to her afterward and indicated that she needed to pay him back part of her salary for the time when she was working half time.[41] Dr. Wilson terminated Ms. Gustafson during her maternity leave and he reported her to the police stating that she owed him over $6,000. Ms. Gustafson spoke to the police and indicated that she was willing to pay Dr. Wilson back to avoid any trouble.[42]

Issues of Material Fact

The aim of the Minnesota Human Rights Act is to eliminate discrimination, including actions taken based on the status of a person, rather than that person's abilities. There is no issue regarding the action having been taken due to the Charging Party's pregnancy. Absent the BFOQ exemption, discrimination is proven. Thus the issue for this motion is whether the facts, taken in the light most favorable to the Charging Party, support a conclusion that the Respondent did not make its decision on the basis of a BFOQ.

Viewing the facts in the light most favorable to the Charging Party, the Respondent was unaware of what job responsibilities were being performed by which employees, the restricted job duties [drawing blood] did not occupy an extremely large part of the Charging Party's job, the Charging Party's immediate supervisor had established a reasonable accommodation for the job restriction, and the Respondent was unaware of both the accommodation and the actual limitations as established by the Charging Party's doctor. These facts, if proven at the hearing in this matter, support a conclusion that the Respondent did not make its decision based on a BFOQ. These facts, if proven at the hearing, support a conclusion that the Respondent engaged in illegal discrimination and that any claim of being motivated by a BFOQ is mere pretext.

Conclusion

The Department has demonstrated that genuine issues of material fact exist as to whether the Respondent's action was motivated by a BFOQ or

[39] *Id*. ¶ 15.
[40] Jacot Aff. Ex. D, Wilson Dep. Ex. 1.
[41] Klausing Aff. ¶ 9.
[42] Jacot Aff. Ex, D, Wilson Dep. 69:18-24, 70:14-16, Ex. M at 10, 13.

whether that is merely a pretext for illegal discrimination. With the existence of genuine issues of material fact, summary disposition is inappropriate. The Respondent's Motion for Summary Disposition is therefore denied.

Motion to Strike

The Department's response to the Respondent's summary disposition motion included information from a Department investigator, Jill Klausing. Respondent has argued that the portion of the Department's brief relying on that information be stricken, along with the Affidavit of Jill Klausing.[43] Respondent submitted discovery requests to the Department, including a request for the Department's investigative file.[44] The Department responded in part, by asserting that some of the information sought, including the investigative file, was nonpublic or confidential data under the Minnesota Data Practices Act (Minn. Stat. Chap. 13) or under Minn. Stat. § 363A.35 of the MHRA.[45]

Respondent maintains that the information sought to be stricken was not revealed during discovery and that it constitutes inadmissible hearsay. The Respondent asserts that an administrative agency cannot rely upon hearsay evidence that would be inadmissible in a judicial proceeding, citing *State ex rel. ISD No. 276 v. Department of Education*. The holding in that decision was that an administrative agency cannot solely rely on "inherently unreliable evidence, under the hearsay rule or otherwise."[46]

The contested case rules governing these proceedings expressly allow for hearsay evidence, stating:

> Subpart 1.Admissible evidence. The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.[47]

Since hearsay is not excluded by the governing rules, if hearsay evidence is offered, the ALJ will make a determination, consistent with the rules, as to whether that evidence is sufficiently reliable to render the evidence admissible. There is no reason to strike the evidence based solely on its hearsay nature.

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[43] As the Department pointed out, the Respondent did not file a formal written motion on this issue. The ALJ with deal with the issue regardless.
[44] Helgen Affidavit, Exhibit B, Request No. 16.
[45] Helgen Affidavit, Exhibit C, at 4, 6, 9, and 11-14.
[46] *State ex rel. ISD No. 276 v. Department of Education*, 296 N.W.2d 619, 627 (Minn. 1977).
[47] Minn. Rule 1400.7300, subp. 1..

The Respondent maintains that the information sought to be stricken was not revealed during discovery. The Respondent asserts that the appropriate sanction is striking the identified information. The relevant discovery standards in contested case proceedings state:

> Subpart 1.Witnesses; statement by parties or witnesses. Each party shall, within ten days of a written demand by another party, disclose the following:
>
> A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.
>
> B. Any relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements
>
> C. All written exhibits to be introduced at the hearing. The exhibits need not be produced until one week before the hearing unless otherwise ordered.
>
> D. Any party unreasonably failing upon demand to make the disclosure required by this subpart may, in the discretion of the judge, be foreclosed from presenting any evidence at the hearing through witnesses or exhibits not disclosed or through witnesses whose statements are not disclosed.[48]

The issue of nondisclosure was analyzed in another recent contested case proceeding:

> The broad brush with which the Department asserts its objection to Respondent's discovery request makes it impossible to determine whether, or to what extent, its investigative file is subject to discovery. The Department has not asserted any privilege recognized by law for withholding information from its file. While there may be documents which are not discoverable, such as those protected by attorney-client privilege, the ALJ cannot determine what they may be based on the Department's response. Therefore, the ALJ is requiring the Department to submit, for in camera review, the documents with specific information about the type of

[48] Minn. Rule 1400.6700, subp. 1

documents being submitted and how or why the documents should not be made available.[49]

The failure to disclose during discovery is correctly cited as a breach of the Department's obligation to reveal, in a timely fashion, the evidence for its various claims against the Respondent. Counsel for the Department recognized that the information, particularly regarding additional witnesses, should be disclosed in the event any of these persons should be called to testify. Counsel promptly disclosed those witnesses after the hearing on this motion.

The rules governing failure to disclose allow the ALJ to exclude undisclosed witnesses or undisclosed documents from admission to the hearing record. Exclusion is a severe sanction and it should not be applied absent a showing of prejudice to the party seeking discovery. In this matter, there is no prejudice since the witnesses are available for interviews prior to the hearing.[50]

While the Department has identified potential witnesses, the contents of the Department's investigative file remains undisclosed. The contents of the file are likely to be relevant to this matter and that file remains undisclosed. Rather than guessing whether any part of the file is appropriately stricken for failing to disclose, the ALJ will require the Department to prepare a privilege log (similar to that required under the Minnesota Rules of Civil Procedure) and identify what information, if any, is actually in the file and properly not revealed due to either the Minnesota Data Practices Act or the MHRA. The ALJ will conduct an *in camera* review of the identified documents and determine whether they can be released. The documents so released will either be redacted or a Protective Order issued that will prohibit the disclosure or use of those documents outside of this proceeding. Subject to these conditions, the Respondent's request to strike is denied.

Motion to Compel Discovery

The Department made a discovery request for the Respondent's payroll records between 2002 and 2005 and specific categories of information regarding former and current employees, dating from January 1, 2002. Respondent objected to the discovery requests as overbroad, and provided the names of 35 employees. Regarding the requested current employee information, the Respondent identified twelve employees. The Respondent supplemented its answers in response to the Department's Motion to Compel. The supplemented

[49] *State of Minnesota by Korbel v. Clay County*, OAH Docket No. 15-1700-18042-2 (Order on Motions to Compel Discovery issued October, 2007).

[50] At the motion hearing, the Respondent maintained that prejudice arose from the expense of deposing these witnesses. There is no requirement that the witnesses be deposed. The Respondent's burden in conducting depositions is no different than if the witnesses were disclosed earlier. The Respondent has not shown prejudice regarding these witnesses.

answers have payroll data for the Respondent from January 9, 2005 to June 3, 2005.[51]

Under the MHRA, where an employer has meets a designated threshold of numbers of employees, the employer is required to accommodate a disabled employee, unless doing so would create an "undue hardship" on the employer.[52] At issue in this proceeding is whether the Respondent is subject to the additional affirmative obligation regarding reasonable accommodation. The pertinent language in the statute sets the standard as "an employer with a number of part-time or full-time employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . equal to or greater than 15 ….."[53]

The Respondent asserted that it met its obligation by providing five months of payroll data ending at the time of the Charging Party's discharge. The Department noted that the statute refers to the current or preceding calendar year, which in this matter would be all of 2004 and all of 2005.

The statutory provision is unambiguous in that where an employer has 15 full- or part-time employees for any period of 20 weeks in the calendar year when the alleged discrimination occurred or the calendar year prior, the threshold is triggered. The Respondent's entire payroll for all of 2004 and all of 2005 is relevant and must be provided.

A different question is posed by the request for specific information, as detailed in the Department's information request regarding persons who left the Respondent's employ from January 1, 2002, onward.[54] The Department is seeking to prove discrimination in employment, which necessarily reaches intent by an employer in making decisions, particularly regarding continued employment. The Department has identified a number of former employees whose employment status with Respondent changed at the time they became pregnant.

The fact of a change in employment status does not, by itself, prove discrimination. But a comparison of the treatment of all employees to that of employees who become pregnant can lead to or reveal evidence of possible discrimination. That sort of evidence is likely to be relevant to the issues in this proceeding. The Respondent has made no showing that the request regarding these specific employees is unduly burdensome. The Department's Motion to Compel is granted.

R.C.L.

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[51] Helgen Discovery Affidavit, Exhibit A. The accompanying brief describes the data provided as running from June, 2004 to June, 2005, but this appears to be incorrect.
[52] Minn. Stat. § 363A.08, subd. 6(a); *Kammueller v. Loomis, Fargo & Co*., 285 F. Supp. 2d 1200, 1210 (D. Minn. 2003).
[53] Minn. Stat. § 363A.08, subd. 6(a).
[54] Jacot Discovery Aff. Ex. E (Initial Information Request).